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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT HUNTER BIDEN, an
individual,

Plaintiff,

vs.

PATRICK M. BYRNE, an individual,

Defendant.

Case No.: 2:23-cv-09430-SVW-PD
Judge: Honorable Stephen V. Wilson
Courtroom: "10A"

**DEFENDANT'S REPLY IN
SUPPORT OF HIS MOTION FOR
SUMMARY JUDGMENT AND/OR
FOR SUMMARY ADJUDICATION
AS TO PLAINTIFF'S
COMPLAINT; MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

*[Filed concurrently with Defendant's Evidentiary Objections
to Plaintiff's Declaration and Exhibits; Defendant's Response
to Plaintiff's Additional Controverted Facts; Defendant's
Response to Plaintiff's Disputed Facts; the Declaration of
Michael C. Murphy]*

Date: November 25, 2024
Time: 1:30 p.m.
Courtroom: "10A"

i.

**DEFENDANT'S REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT/SUMMARY
ADJUDICATION OF ISSUES AS TO PLAINTIFF'S COMPLAINT**

Case No. 2:23-cv-09430-SVW-PD

**TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD
HEREIN:**

PLEASE TAKE NOTICE that Defendant hereby files his Reply in support of his Motion for Summary Judgment on the grounds that Plaintiff has failed to produce any evidence to show a genuine triable issue of material fact supported by admissible evidence that proves that Defendant acted with malice against Plaintiff a public figure in that he made false statements of fact with either knowledge of falsity, or with reckless disregard for the truth. Plaintiff has also failed to comply with the provisions of Federal Rules of Civil Procedure 56(d) and has not filed the required declaration to show good cause for a continuance of the hearing of this motion or that it be denied because Plaintiff could not diligently obtain discovery he needs to oppose the motion.

Dated: November 12, 2024

LAW OFFICES OF MICHAEL C. MURPHY

By: /s/ Michael C. Murphy, Esq.

Michael C. Murphy, Esq.
Michael C. Murphy, Jr., Esq.
Attorneys for Defendant,
Patrick Byrne

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iv.

DEFENDANT’S REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT/SUMMARY
ADJUDICATION OF ISSUES AS TO PLAINTIFF’S COMPLAINT

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Defendant Patrick Byrne respectfully requests that this Court grant his motion for summary judgment. Plaintiff conceded his public figure status, which requires he prove Defendant made false statements with actual malice. Further, Plaintiff has offered no actual clear and convincing evidence establishing a triable issue of fact in this matter. Plaintiff has proffered no clear and convincing evidence that the Defendant knew his statements were false at the time they were made or that Defendant had serious doubts about the veracity of the statements before he published them.

Further, the additional “facts” and “statements” of Undisputed Fact that Plaintiff included in his response to the uncontroverted facts are neither relevant nor material to the issue of actual malice. Plaintiff has not filed a Declaration showing how and in what manner the evidence he has submitted shows that Defendant acted with the required malice against him. He cannot file such a Declaration and relies on his counsel’s Declaration with the exhibits attached to it because he cannot contradict his deposition testimony that is attached to the moving papers filed by Defendant. The opposition evidence is not clear and convincing and is also mostly inadmissible internet posts and summaries.

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is a genuine issue of *material* fact. (*Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-248 (1986). An issue of fact is genuine if it can easily be resolved in favor of either party. (*Id.* at 250-251.) Mere disagreement or the bald assertion that that a genuine issue of material fact exists does not preclude summary judgment. (*Harper v. Wallingford* 877 F.2d 728, 731 (9th Cir. 1989).

Plaintiff’s request that the court should alternatively either continue the hearing of the motion to allow him to conduct more discovery or deny the motion

1.

1 should be denied by the court. Plaintiff has not submitted the required declaration
2 demonstrating good cause for why he has not conducted the discovery that he
3 needs to oppose the motion or information on any of the other requirements
4 mandated by the code to be entitled to a continuance or for the court to deny this
5 motion. Moreover, his counsel was offered and refused an extension of time if he
6 needed it to prepare and file Plaintiff's opposition to the motion for summary
7 judgment and clearly confirmed he had more than enough evidence to oppose this
8 motion for summary judgment. Plaintiff's request for a continuance to conduct
9 discovery is nothing but a strategy and tactic.

10 **II. LEGAL ARGUMENT**

11 **A. Defendant Has Met His Burden of Negating Plaintiff's Cause of** 12 **Action for Defamation**

13 Plaintiff offers no clear and convincing admissible evidence or facts showing
14 that the Defendant knew at the time he made the statements that are the subject of
15 his defamation claim were false or that he had serious doubts about the veracity of
16 the statements before he published them. Plaintiff produced no witnesses, no
17 evidence, no declaration, and no documents showing with clear and convincing
18 evidence that Defendant acted with malice when publishing his statements that are
19 the subject of Plaintiff's defamation claim.

20 Plaintiff only offers a single piece of evidence by him on this topic which is a
21 comment he made during his deposition when he was represented by four lawyers
22 coaching him and that did not respond to the question asked about whether he had
23 any evidence that Defendant acted hostilely towards him prior to the publication
24 of the statements he claims were false and defamatory. Plaintiff could not claim he
25 had any such evidence but tried to qualify his testimony that such evidence is not
26 before him. This deposition testimony by Plaintiff is not clear and convincing
27 evidence of Defendant's malice that Plaintiff is required to prove.
28

1 Then in his opposition, Plaintiff uses his counsel's Declaration to try and use
2 mostly inadmissible internet evidence to allegedly show Defendant's claimed
3 hostility toward Plaintiff but without the Plaintiff's Declaration showing his state
4 of mind and perception of these exhibits. Plaintiff's counsel's Declaration is not
5 sufficient to show with clear and convincing evidence as to Plaintiff's state of
6 mind and how Plaintiff has interpreted these opposition exhibits which are before
7 him and the court as showing hostility towards him or how that claimed hostility
8 proves that Defendant acted with the required malice to require that this motion be
9 denied by the court.

10 Self-serving declarations uncorroborated by other testimony cannot create a
11 genuine issue of material fact and particularly when they do not offer any
12 evidence which is the subject of the motion to wit: Defendant acted with malice
13 with clear and convincing evidence. (*Villiarimo v Aloha Island Air, Inc.* 281 F.3d
14 1054, 1061 (9th Cir. 2002). Plaintiff's single statement in his deposition while
15 being coached by his four counsel that he did not know if Defendant published
16 articles showing hostility towards him before the alleged false defamatory
17 statements were made and then trying to overcome that admission by Plaintiff
18 with his counsel's Declaration using inadmissible exhibits and asking the court to
19 extrapolate from them Plaintiff's state of mind as to those exhibits and conclude
20 that they admissible evidence of Defendant's hostility towards Plaintiff before he
21 published the alleged defamatory statements are insufficient to defeat summary
22 judgment here because Plaintiff finally admitted he is a public figure. (*New York*
23 *Times Co. v Sullivan* 376 U.S. 254, 270 (1964).

24
25 1. *Plaintiff Has No Clear and Convincing Evidence to Demonstrate Actual*
26 *Malice*

27 Plaintiff proffered no clear and convincing evidence that the statements
28 Defendant made were done with actual malice. Plaintiff bears the burden to prove

1 with clear and convincing evidence that Defendant either knew the statements
2 were false, or that he made the statements with serious doubts about the veracity
3 of those statements. (*New York Times Co. v Sullivan* 376 U.S. 254, 270 (1964).
4 Yet, he provides no evidence of either. In fact, Plaintiff acknowledged that he
5 lacked knowledge whether Defendant knew the statements were true, or whether
6 Defendant harbored any serious doubts as to their veracity before they were
7 published. (See Plaintiff's Responses to Defendant's Uncontroverted Material
8 Fact #s 37-38.)

9 Plaintiff claims alleged "hostility" by Defendant towards Plaintiff and/or
10 Plaintiff's father only with only the use of his counsel's declaration and not
11 Plaintiff's declaration using exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16,
12 14, 58, 59, 63, and 64 that he attaches to his counsel's declaration. However, this
13 evidence submitted to the court by Plaintiff is not clear and convincing evidence
14 of Defendant's malice towards Plaintiff that he is required to show to defeat this
15 motion.

16 Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 14, 58, 59, 63, and 64
17 are internet posts that have not been properly authenticated and are inadmissible.
18 Defendant has filed evidentiary objections to each of these exhibits. However,
19 even if the court were to overrule those objections, there are two reasons why
20 these exhibits do not prove Defendant's claimed malice with clear and convincing
21 evidence.

22 During his deposition, Plaintiff admitted he could not identify anything
23 Defendant put in writing showing hostility towards him prior to making the
24 claimed statements in this case. He answered the question twice and could not
25 answer it as to him but only his family. (UMF 43)

26 Moreover, these prepublication exhibits are merely political discourse and
27 opinion that is protected by the First Amendment. They are not proof of malice by
28

1 Defendant with clear and convincing evidence relating in any way to the
2 publication of the statements at issue in this case. They do not even relate in any
3 way to the alleged defamatory statements.

4 Moreover, hostility alone by a Defendant towards a Plaintiff is not enough to
5 prove with clear and convincing evidence actual malice by Defendant in
6 statements he made against a public figure plaintiff that are the subject of a
7 defamation claim. (*Schoen v Schoen* 48 F.3d 412, 417 (9th Cir. 1995), *citing to*
8 *Greenbelt Cooperative Publishing Ass'n v Bresler* 398 U.S. 6, 10-11 (1970):
9 “‘spite, hostility, or deliberate intention to harm’ not equivalent to actual malice.”)

10 Plaintiff also relies in his opposition on alleged post publication statements
11 and publications by Defendant to try and prove actual malice with clear and
12 convincing evidence. These are Exhibits 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28,
13 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 60, 61,
14 62, and 65. Defendant has filed evidentiary objections to each of these exhibits.
15 However, even if the court were to overrule those objections and consider these
16 exhibits, they are merely political discourse and opinion that is protected by the
17 First Amendment and especially with Plaintiff admitting he is a public figure
18 involved in the political arena. Just like the prepublication exhibits, these post
19 publication exhibits make no reference at all to the alleged defamatory statements.
20

21 None of these alleged post defamatory statements contained in Exhibits 18,
22 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40,
23 42, 43, 44, 45, 46, 47, 48, 49, 60, 61, 62, and 65 show that Defendant knew his
24 alleged defamatory statements were false when he made them or had serious
25 doubts about the veracity of those statement before they were published.

26 For example, Plaintiff has not demonstrated any nexus between the
27 statements related to his laptop and the statements in question in his exhibits.
28 Additionally, the alleged statements purportedly made by Defendant regarding

1 Plaintiff's laptop and indictments ultimately proved correct: Plaintiff was indicted
2 twice in 2023, and evidence purportedly on his "laptop" was used at his gun trial.
3 Plaintiff does not even attempt to tie in the statements and publications in his
4 exhibits to the alleged defamatory statements.

5 And to the extent any of Plaintiff's exhibits relate at all to the alleged
6 defamatory statements, there is nothing in those exhibits which prove with clear
7 and convincing evidence of any kind that Defendant knew that when he made the
8 alleged defamatory statements that they were false or he had serious doubts about
9 the veracity of those statements before he published them.

10 Worse yet, the transcript summaries Plaintiff relies on are poorly transcribed,
11 and contain numerous errors, including obvious spelling errors, grammatical
12 errors, and omissions. For example, the transcription of the audio voicemail
13 recording submitted, Plaintiff's Exhibit 54, changes "lobbying firm" to "law big
14 firm," which makes little sense. Similarly, in Plaintiff's Exhibit 31 transcribes the
15 phrase "nothing to write home about" as "nothing to **wright** home about" twice.
16 There are numerous other mistakes in the transcripts, including inconsistent and
17 incomplete time-stamps, gaps, and incorrect transcriptions of statements and
18 phrases. Such errors render the transcriptions unreliable. Moreover, there is no
19 testimony offered by the actual transcriber that the transcriptions were correct, or
20 what efforts were made to ensure they were correct. Unedited transcripts such as
21 these fail to meet the requirements for authentication under Federal Rule of
22 Evidence Rule 901(a) and are inadmissible pursuant to Federal Rule of Civil
23 Procedure 56(c)(2) and (4). (*Snyder v CitiSteel USA Inc.*, 508 F.Supp.2d 407, 412-
24 413 (D. Del. 2007): unedited transcript not authenticated and employee conceded
25 it contained numerous errors.) Similarly, "edited, non-verbatim, *non-final*" draft
26 transcripts are inadmissible under Federal Rules of Evidence 901(a) and 104(b)
27 because they are not authenticated and contain numerous errors. (*Bank Brussels*
28

1 *Lambert v Credit Lyonnais (Suisse) S. A.*, 168 F.Supp.2d 57, 58, 60-61.) Here, the
2 transcriptions are clearly non-verbatim, unedited drafts that have not been
3 authenticated. As such, they cannot be considered, and should be disregarded.

4 Plaintiff relies on *Sanders v Walsh* (2013) 219 Cal.App.4th 855 as an example
5 of clear and convincing evidence of actual malice in which the defendant there
6 admitted to making harsh statements about the Plaintiff. However, that is not the
7 case here. The “harsh statements” in *Sanders* ended up in that case to being the
8 defamatory statements that the defendant in that case ultimately admitted to
9 making after initially ***denying*** she made them and that were the basis of Plaintiff’s
10 claim against the Defendant in that case. (*Id.* at pp. 862, 874.)

11 Similarly, Plaintiff relies on *Curtis Publishing v Butts* 388 U.S. 130 (1960)
12 for the proposition that an ***intentionally*** inadequate investigation supports a
13 finding of actual malice because that evidence shows Defendant had serious
14 doubts about the statement but published them. However, that case is inapplicable
15 here.
16

17 Plaintiff has not offered one scintilla of evidence that Defendant ***intentionally***
18 conducted an inadequate investigation and went ahead and published the alleged
19 defamatory statements in this case knowing they were false or had serious doubts
20 about whether the statements were true. Plaintiff has no witnesses, no documents,
21 and no declarations of any kind showing with clear and convincing evidence that
22 Defendant ***intentionally*** conducted an inadequate investigation and acted with the
23 required malice.

24 Plaintiff also relies on *Kaelin v. Globe Commc’ns Corp.*, 162 F.3d 1036 (9th
25 Cir. 1998) as a final example of actual malice. However, *Kealin* is inapposite here.
26 In that case, a newspaper ran a headline that accused the plaintiff of killing O.J.
27 Simpson’s wife. (*Id.* at 1042.) However, the plaintiff in that case offered the
28 testimony of the editor who admitted that he doubted the accuracy of the headline.

1 (*Ibid.*) His deposition testimony that “the front page of the tabloid paper is what
2 we sell the paper on, not what’s inside it” *supported an inference that the headline*
3 *was intentionally false to capture the intention of the reader and sell magazines.*

4 (*Ibid.*)

5 Here, Plaintiff has offered absolutely no evidence Defendant intentionally
6 published knowingly false statements, or that he published them with reckless
7 disregard for the truth. Plaintiff has no witnesses, no documents, and no
8 declarations of any kind showing with clear and convincing evidence that
9 Defendant intentionally published the statements either knowing they were false,
10 or with reckless disregard for the truth and/or intentionally conducted an
11 inadequate investigation.

12 Finally, Plaintiff misrepresents Defendant’s statements in his discovery
13 responses, which clearly stated that Defendant merely relied on David Smith and
14 John Moynihan to help *verify* the identity of the person who made statements on
15 the tapes he obtained prior to the publication of the alleged defamatory statements.
16 At no point does Defendant ever state in his discovery responses that he relied on
17 David Smith or John Moynihan for information from them to create the published
18 statements that Plaintiff claims are defamatory in this case.

19 Internet posts are viewed as a catalyst for rumor, innuendo and
20 misinformation. Consequently, information from the internet is regarded as
21 inherently untrustworthy. (*St. Clair v. Johnny’s Oyster & Shrimp, Inc.* 76 F. Supp.
22 773, 774-775 (SD TX 1999).) Plaintiff’s exhibits that were allegedly procured
23 from websites and or social media are inadmissible because Plaintiff has not
24 provided this court in his opposition with actual proof based on the personal
25 knowledge of who maintains the website where the publications occurred, who
26 authored the documents on the websites and social media posts, who authorized
27 the publication of the statements, and the accuracy of the documents’ contents
28

1 printed from the website. (*Wady v. Provident Life & Accident Ins. Co. of America*
2 216 F. Supp.2d 1060, 1064-1065 (CD CA 2002).

3 The internet exhibits referenced herein that Plaintiff offers with his
4 opposition to the motion for summary judgment are untrustworthy internet
5 information that are not properly authenticated as required by the rules of
6 evidence. Plaintiff's counsel attests he took screenshots of various posts allegedly
7 taken from Defendant's website and social media platforms as well as other
8 websites. However, it is not clear that the posts that allegedly came from these
9 sites were actually posted by Defendant or someone authorized to make these
10 posts by Defendant. There is also no evidence provided by Plaintiff that the social
11 media posts were made or authorized to be published by Defendant. Plaintiff's
12 counsel's sole attestation that he took the screenshots that are attached to his
13 Declaration in support of Plaintiff's opposition to the motion for summary
14 judgment cannot satisfy this requirement.

15 Even if the Court believes all the evidence proffered by Plaintiff, and draws
16 all inferences in his favor, Plaintiff cannot prevail. (See *Anderson v Liberty Lobby*
17 477 U.S. 242, 255-256 (1986). The evidence comprises mainly of screenshots
18 taken by Plaintiff's counsel both before and after the date of the publication in
19 question, but they do not speak about the issues at play here. Plaintiff does not
20 dispute his deposition testimony that he has no knowledge of whether Defendant
21 lacked knowledge of the falsity of the statements and/or had no knowledge serious
22 doubts about the truthfulness of the statements (See Plaintiff's Responses to
23 Defendant's Uncontroverted Material Fact #s 37-38.).

24 Plaintiff's inflammatory allegations that Defendant is, in essence, a right-
25 wing nutjob and acted with the required malice (knowledge the statement was
26 false when made or had doubts about the veracity of the statements before they
27 were published) simply by providing inadmissible evidence of his political beliefs
28

1 with the exercise of his First Amendment rights to state his political beliefs and
2 when Plaintiff is a political public figure in the arena does not constitute clear and
3 convincing evidence of malice by Defendant in this case. Plaintiff's evidence
4 attached to his client's Declaration is also mostly inadmissible character evidence.
5 (*Fed. Rules of Evid. Secs. 401, 404(a)(1).*)

6 **B. Plaintiff's Request for a Continuance Should be Denied.**

7 1. *The Law Applicable to Requests for Continuance Related to a Motion for*
8 *Summary Judgment.*

9 Federal Rule of Civil Procedure Rule 56(d) allows a party to file an
10 affidavit or declaration and ask the court to defer consideration of a motion for
11 summary judgment or to deny it to allow the opposing party more time to obtain
12 affidavits, declarations or to take discovery to then be used to oppose the motion.
13 This reason for this rule is to prevent the opposing party from being "railroaded"
14 by a premature motion for summary judgment. (*Celotex Corp. v. Catrett* 477 US
15 317, 106 S.Ct. 2548, 2554 (1986); *Rivera-Torres v. Rey Hernandez* 502 F.3d 7, 10
16 (1st Cir. 2007).)

17 The opposing party's required **declaration** that must be filed with a
18 continuance request under Federal Rule of Civil Procedure 56(d) must show (a)
19 facts indicating a likelihood that controverting evidence exists as to a material
20 fact, (b) **specific** reasons why such evidence was not discovered or obtained
21 earlier in the proceedings, (c) the steps or procedures by which the opposing party
22 proposes to obtain such evidence in a reasonable amount of time and an
23 explanation of how those facts will suffice to defeat the motion for summary
24 judgment. (*Tatum v. City & County of San Francisco* 441 F.3d 1090, 1101 (9th
25 Cir. 2006).

26 Rule 56(d) is not self-executing and the court has no obligation to invoke it.
27 The party seeking continuance of the motion must comply with the requirements
28

1 of the code and not oppose the motion for summary judgment through the use of a
2 requested Rule 56(d) continuance as a strategic and tactical effort to try and defeat
3 a motion for summary judgment. (*United States v. Kitsap Physicians Service* 314
4 F.3d 995, 997 (9th Cir. 2002).)

5 Plaintiff must accept the consequences of his choice to delay and not
6 conduct discovery diligently and particularly when Plaintiff is given notice by
7 Defendant that he intends to bring a motion for summary judgment. (*Cornwell v.*
8 *Electra Cent. Credit Union* 439 F.3d 1018, 1027 (9th Cir. 2006); *Stitt v. Williams*
9 919 F.2d 516, 526 (9th Cir. 1989).)

10 Rule 56(d) is not designed to give relief to those who sleep upon their rights
11 and do not act with due diligence both in conducting discovery and in promptly
12 seeking a Rule 56(d) extension of time thereafter. (*Rivera-Torres v. Rey*
13 *Hernandez* 502 F.3d 7, 10 (1st Cir. 2007).) If the opposing party already had ample
14 opportunity to conduct discovery, the request for a continuance should be denied.
15 (*Cornwell v. Electra Cent. Credit Union* 439 F.3d 1018, 1027 (9th Cir. 2006); *Stitt*
16 *v. Williams* 919 F.2d 516, 526 (9th Cir. 1989).)

17 Finally, under Federal Rule of Civil Procedure 41(b), Plaintiff must
18 diligently prosecute his case including diligently conducting discovery and the
19 court can dismiss a case if Plaintiff fails to comply with the court's discovery
20 orders and its case management orders. The duty to diligently prosecute the case is
21 not imposed on the Defendant.
22

23 **2. The Court Should Deny the Requested Continuance and Grant the**
24 **Motion for Summary Judgment.**

25 On or about March 20, 2024, this court issued its Civil Trial Preparation
26 Order. In the court's Order at page 4, the court ordered that the discovery process
27 shall begin with that order and discovery should be conducted to the fullest extent
28 possible. The Court also noted in its Order that it does not look favorably upon

1 delay resulting from unnecessarily unresolved discovery disputes.

2 Plaintiff has four lawyers representing him in this case. They are all
3 employed by prominent large law firms. All along Plaintiff has had ample legal
4 talent representing him in this case. Any of those four lawyers were always able to
5 assist with the prosecution of this case including diligently conducting discovery
6 and taking depositions.

7 Although Plaintiff contends in his Opposition papers that he needs a
8 continuance to conduct discovery to oppose the motion for summary judgment,
9 Plaintiff has failed to comply with the requirements of Rule 56(d) and has not
10 filed with the court and made an application based on the Declaration information
11 required by the code including a showing of due diligence in conducting
12 discovery, why the continuance is needed, and why the request for a continuance
13 was not requested sooner. On that basis alone, the request for a continuance
14 cannot be granted by the court because the Declaration required by Rule 56(d) has
15 not been filed with the court.

16
17 From March 20, 2024, to the present, Plaintiff has not taken a single
18 deposition. Defendant's counsel warned Plaintiff's counsel on August 18, 2024,
19 and during an IDC that he intended to proceed with a motion for summary
20 judgment and Plaintiff should conduct whatever discovery they need to oppose the
21 motion. Plaintiff never opposed the notice by Defendant.

22 On October 30, 2024, Defendant's counsel offered to move the date and
23 related deadlines for the summary judgment motion, in light of the Magistrate
24 Judge's ruling regarding Defendant's deposition. Defendant offered to move the
25 date to accommodate Plaintiff in taking the deposition of Defendant. Plaintiff's
26 counsel specifically refused Defendant's offer of an extension and in his e-mail of
27 October 30, 2024, wherein he stated:

28 "We see no need at this point to continue any of the pretrial dates *or any of*

1 *the deadlines associated with Defendant's Motion for Summary Judgment as we*
2 *are ready to proceed on all fronts.* As such, we will not agree to enter into a
3 stipulation to continue any of the dates you propose."

4 Plaintiff's counsel categorically refused a continuance, and stated he was
5 ready to proceed with Plaintiff's Opposition to Defendant's Motion for Summary
6 Judgment. These e-mails were not submitted to the court with Plaintiff's
7 opposition papers and with his request for a continuance of the summary judgment
8 motion.

9 As mentioned above, the matter has been pending for a year. Defendant
10 filed his answer February 13, 2024. Plaintiff waited until he opposed the motion
11 *on the merits* to request a continuance of the motion dates on the grounds he needs
12 more discovery. Moreover, the evidence he claims to seek is not likely to prevent
13 summary judgment. In fact, while Plaintiff seeks to depose Defendant on the basis
14 the deposition will show actual malice, he offers no factual basis for that assertion
15 with the required Declaration. (See *Margolis v Ryan* 140 F.3d 850, 853-854 (9th
16 Cir. 1998).) Similarly, Plaintiff provides no evidence that the information he seeks
17 from Defendant regarding David Smith would preclude summary judgment. (*Ibid*;
18 *Chance v Pac-Tel Teletrac, Inc.* 242 F.3d 1151, 1161 n.6. (9th Cir. 2001): non-
19 moving party failed to identify what the missing evidence may be.)

20 Moreover, Plaintiff bears the burden to demonstrate he diligently pursued
21 all discovery opportunities after the initial case management conference and must
22 show that the additional discovery *would have* precluded summary judgment.
23 (*Chance v Pac-Tel Teletrac, Inc.* 242 F.3d 1151, 1161 (9th Cir. 2001): non-moving
24 party learned of witnesses seven months prior, and made no argument why it
25 could not take additional discovery in that time period, and thus failed to
26 diligently pursue discovery; *Byrd v Guess* 137 F.3d 1126, 1131 (9th Cir. 1998).
27

28 Here, Plaintiff offers no explanation why he needs to only depose

1 Defendant regarding Defendant's discussions with David Smith. First, Defendant
2 never once stated that he only relied on Mr. Smith for the statements themselves.
3 Defendant's verified discovery responses make it clear that he verified the facts
4 relating to the tapes and the identity of the person on them *with the assistance of*
5 Mr. Smith and Mr. John Moynihan. Secondly, Defendant identified David Smith,
6 Mr. John Moynihan, and provided their contact information, in his verified May
7 23, 2024, discovery responses. Plaintiff has provided no explanation why he could
8 not take Mr. Smith's deposition in the last six months pending Defendant's
9 deposition. Again, Plaintiff has provided no explanation why he could not depose
10 Mr. Moynihan over the last six months pending Defendant's deposition.

11 **C. Plaintiff Ignored Defendant's Efforts to Meet and Confer**

12 Defense counsel made every effort to meet and confer in compliance with
13 the Local Rules. However, Plaintiff disregarded Defendant's email. Plaintiff
14 acknowledged Defendant's intent to file the motion on August 17, 2024, although
15 he did so indirectly, and only as an argument to bolster his argument during a
16 discovery dispute. He otherwise failed to discuss the matter with Defense counsel
17 further, and largely ignored defense counsel's email. Regardless, Plaintiff opposed
18 the motion on the merits, relegating his concerns about Defendant's efforts to meet
19 and confer to a mere footnote and claimed before he filed his opposition that he
20 did not need a continuance to oppose the motion.
21

22 **III. CONCLUSION**

23 As Plaintiff has produced no evidence to show a genuine triable issue of
24 fact supported by admissible evidence proving with clear and convincing evidence
25 of Defendant's malice or good cause for a continuance of the hearing of this
26 motion, Defendant respectfully requests the Court grant summary judgment in its
27 entirety in his favor.
28

1 Dated: November 12, 2024

LAW OFFICES OF MICHAEL C. MURPHY

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3 By: /s/ Michael C. Murphy, Esq.

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6 Michael C. Murphy, Jr., Esq.
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8 Patrick Byrne
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